

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agreed that there was no dispute as to the 10 percent functional impairment awarded by the ALJ, nor is there any contest as to the 53 percent wage loss or 58 percent task loss found by the ALJ.

ISSUES

The ALJ found that claimant suffered a 10 percent whole body functional impairment. He also found that claimant sustained his burden of proof by establishing that he suffered a permanent partial (work) disability in the amount of 55.5 percent, based upon a wage loss of 53 percent and a task loss of 58 percent. The ALJ found that the evidence and testimony of Drs. Paul Stein and Philip Mills had greater credence, as treating physicians, over that of Dr. Lee Dorey, who was seen solely for the purpose of rating and task loss opinions. Accordingly, claimant was awarded work disability benefits. He further found that claimant's failure to appear for work on May 19 and 20, 2003 was the result of "merely a failure of communication between the parties".¹ The ALJ went on to suggest that even if the termination was improper, that fact would not automatically preclude consideration of a work disability award under the principles set forth in *Beck v. MCI Business Services, Inc.*²

The respondent requests review on the sole issue of work disability. Respondent contends it fired claimant "for cause" for his failure to call in or report for work on May 19, and 20, 2003. As a result of his failure to appear or call in on those days and after a full investigation, claimant was fired. Thus, respondent argues claimant's lack of good faith in retaining his employment with respondent precludes work disability benefits. Put another way, had claimant acted appropriately and retained his employment with respondent, he would still be making a comparable wage and would therefore not be entitled to work disability under K.S.A. 44-510e(a).

Claimant argues the ALJ's Award should be affirmed in all respects. He contends the evidence supports the finding that he did, in fact, call in as he says and that he was wrongfully terminated following his two day absence. The failure of respondent's staff to recall or document his May 15th request for vacation time on May 19 and 20 does not outweigh his testimony and the evidence he offered in support of his version of the events leading up to his absence justifies the ALJ's finding of a 55.5 percent work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's Award should be affirmed.

The ALJ has fully set forth the facts contained within the record and there is no need to repeat them here except as needed to explain the Board's decision. Distilled to their

¹ ALJ Award (Mar. 19, 2004) at 9.

² *Beck v. MCI Business Services, Inc.*, 32 Kan. App. 2d 201, 83 P.3d 800 (2003).

essence, the facts are quite simple. Claimant sustained a compensable injury on April 2, 2002 when he fell from a ladder and injured his low back. He received treatment and neither party disputes the 10 percent functional impairment assessed by the ALJ in his Award.

Rather, the dispute stems from the claimant's failure to appear for work on May 19 and 20, 2003, the circumstances leading up to his absence, the respondent's investigation following that absence and its implications on the claimant's claim for permanent partial (work) disability benefits under K.S.A. 44-510e(a).

Claimant testified that he called his employer on May 15, 2003 to tell Regina Stewart, a L.P.N. in the nursing station, that he would not be working that day due to back pain. He then asked to be transferred to Debbie Gibson, respondent's safety manager, who oversaw claimant's post-injury work assignments. Claimant says his call was transferred to Ms. Gibson and he advised her that he needed May 19 and 20 off to attend a dental appointment in Colorado. Claimant says Ms. Gibson approved this absence.

There is no dispute that claimant had vacation time available to him and that seeking pre-approval was the necessary course of action for claimant to take in order to take a vacation. Claimant is able to document a phone call lasting a few minutes made on May 15, 2003 to respondent's plant. He is likewise able to document an overnight stay on May 19th and dental services on May 20th in Colorado.

Ms. Gibson testified that she does not recall any phone call on May 15, 2003 from claimant regarding his request for vacation on May 19 and 20. There is no reference in her telephone log nor in the logs of any of the other individuals that might have taken claimant's message or noted a call from him.

Claimant returned to work on May 21 and 22, and was off on May 23. On May 27, 2003, Marc Ziegler, the employee services coordinator, learned that claimant had not worked on May 19 and 20. An investigation was commenced to determine why claimant did not appear for work. When first confronted, claimant believed he had worked both of those days. The time records did not confirm that fact and at that point claimant recalled his dental appointment and his request for vacation. Mr. Ziegler indicated that vacation time had not been approved and as a result, claimant was suspended pending termination for his failure to appear for work or call in on two occasions. It is worth noting that claimant had no history of attendance problems before this event.

Claimant advised Mr. Ziegler that Ms. Gibson had approved his absence and claimant was given an opportunity to talk to Ms. Gibson to see if she could corroborate his contention. When confronted by claimant, Ms. Gibson indicated she did not recall any phone conversation with claimant on May 15. When Ms. Gibson was unable to confirm her approval of claimant's vacation request, Ms. Ziegler fired claimant.

Respondent maintains claimant's version of the events is less than credible. Respondent paints claimant as one who alters his explanation until such time as the explanation no longer fits the facts then tells another version. Respondent also points to claimant's admission that he lied as further justification to reject his version of events. While claimant told Ms. Gibson that he recorded their conversation, he told her this falsehood in an effort to help "refresh" her recollection.

The ALJ considered these arguments and noted that the decision of whether claimant was entitled to work disability benefits under K.S.A. 44-510e(a) is governed by the principles set forth in *Copeland*.³ Judge Moore indicated the Kansas Court of Appeals has interpreted the provisions of K.S.A. 44-510e(a) to require an injured worker to exercise good faith in seeking replacement employment. That concept has been extended to require an employee to exercise good faith in retaining accommodated employment.⁴

The ALJ applied these principles to the facts and hand and stated as follows:

While [c]laimant has done little to enhance his own credibility, by lying about whether he recorded a telephone conversation with Deborah Gibson, and seemingly being confused about when and how he requested time off, in the final analysis, [c]laimant did not conduct himself in a manner to suggest he was abandoning his employment. The best evidence available to the Court establishes that [c]laimant went to Colorado for dental work and thereafter returned to work. The record would certainly support the conclusion that there was, at worst, merely a failure of communication between the parties as to [c]laimant's request for time off work on May 19 and 20.⁵

The Board concludes the ALJ's legal analysis is correct and his findings are reasonable and should be affirmed. Admittedly claimant could have been more attentive to detail when asking for vacation, but Ms. Gibson was getting ready to leave on vacation herself and was, in fact, gone on May 19 and 20. Thus, her inability to recall a conversation with claimant is understandable. As noted by the ALJ, claimant had the vacation time available to him, all he had to do was ask. He had a rather lengthy history with the company and it makes little sense that he would purposefully or recklessly abandon his employment when he could easily obtain approval for his absence. For these reasons, the Board affirms the ALJ's Award in all respects.

³ *Copeland v. Johnson Group, Inc.*, 24 Kan. App.2d 306, 944 P.2d 179 (1997).

⁴ ALJ Award (Mar. 19, 2004) at 8. (citing *Endicott v. Riverside Health System*, Docket No. 90,316) (Kansas Court of Appeals unpublished opinion filed February 27, 2004). (copy attached pursuant to Sup. Ct. Rule 7.04).

⁵ *Id.* at 8-9.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated March 19, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Andrew E. Busch, Attorney for Claimant
Mickey W. Mosier, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director